Supreme Court, U.S.
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In the Supreme Court of the United States

MICHAEL TEN EYCK, individually, THOMAS LINDERT, individually, CARMINE RESTIVO, individually, and ROBERT THOUBBORON, individually,

Petitioners,

v.

JOHN LEATHER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Second Circuit Court of Appeals err when it held that *Heck v. Humphrey*, 512 U.S. 477 (1994) did not apply to the facts of Respondent John Leather's §1983 claim?

Is this Petition for a Writ of Certiorari properly before this Court?

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STATEMENT OF THE CASE

Respondent John Leather commenced this §1983 action for a violation of his right to be free from selective prosecution. He alleged that the Petitioners herein selectively enforced the New York State Vehicle and Traffic Laws against him in retaliation for his First Amendment protected speech.[1] He further alleged that he was subject to selective enforcement of the County of Putnam's policy prohibiting County employees from drinking alcohol and subsequently driving their County owned vehicle. Leather named as Defendants each of the Petitioners and the County of Putnam.[2]

Petitioners and the County of Putnam moved to dismiss Leather's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The United States District Court, Southern District of New York, granted the motion holding, in relevant part, that Leather's selective prosecution claim was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994) because his §1983 claim implied the invalidity of his underlying criminal conviction. *See* Pet., App. D at 56a-58a.

Leather appealed the District Court's dismissal of his complaint. On June 11, 1999, the Court of Appeals for the

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[1] Leather was charged with Driving While Intoxicated and after a bench trial was convicted of Driving While Ability Impaired and driving left of the double yellow line. New York State Vehicle and Traffic Law §§1192.3 and 1126(a).

[2] Leather also sued Putnam County Sheriff's Office Investigator Daniel Stephens. However, at the conclusion of Leather's direct case, the claim against Stephens was dismissed. *See* Pet., App. B at 15a.

Second Circuit reversed, holding that *Heck* did not apply to the facts of Leather's case. *See* Pet., App. C at 38a-40a. Neither Petitioners nor the County of Putnam petitioned this Court for a writ of *certiorari*.

Leather's selective prosecution claim therefore proceeded to a jury trial. There, Leather proved that the Petitioners selectively targeted him for arrest and prosecution in retaliation for his expressions of opinion on matters of public concern. Leather also proved that Petitioners selectively enforced the laws against him in that other individuals were neither arrested nor charged despite the Petitioners knowledge that these individuals drove while intoxicated or while their ability was impaired. *See* Pet., App. B at 20a and 24a.

With respect to his employment, Leather also proved, as confirmed by the District Court's post trial opinion, that the County of Putnam's policies were selectively enforced against Leather in that the County did not take any adverse employment action against other employees who were known to both drink alcohol and then drive their County vehicle and other employees who were involved in motor vehicle accidents after consuming alcohol. *See* Pet. App. B at 24a-25a.

At no time did Leather ever contest or even infer that the underlying criminal conviction was invalid. In fact, Leather readily admitted at trial that he was convicted of driving while his ability was impaired. That fact was not only mentioned from the outset during both counsel's opening statement but was further proven by testimony elicited by Leather's counsel during the trial.[3]

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[3] Although Petitioners assert Leather could have raised as a defense in the underlying criminal case that he was selectively targeted, as noted by the District Court: "he did not have the benefit of the pretrial discovery in this litigation

The jury returned a verdict in favor of Leather, awarding him $200,000 in compensatory damages as against all of the Defendants with an additional $445,000 combined in punitive damages against the Petitioners herein. *See* Pet., App. B., at 14a-15a. In response to post trial motions, the District Court offered Leather a new trial limited to the issue of damages unless he executed a written remittitur with respect to the punitive damages. Leather executed the remittitur and judgment in the amount of $271,629.70 was entered on May 24, 2000. *See* Pet., App. A at 4a-5a and App. B at 32a-33a.

Petitioners and the County again appealed to the Second Circuit. This time the County again argued the applicability of *Heck* to these facts. The Petitioners did not put forth a similar argument in their brief but instead purported to "adopt" the County's argument in a footnote to their brief. *See* Pet., at 5.

In response, the Second Circuit Court of Appeals advised the County's counsel during oral argument that should it wish to revisit the argument previously decided against them in *Leather I*, the proper vehicle was to seek an *en banc* hearing before the Second Circuit. The Second Circuit further wrote in its opinion:

> The county's arguments concerning Heck and collateral estoppel have already been rejected in our earlier decision in this case. *See Leather*, 180 F.3d at 423-426. The County's reprise adds nothing that would make it

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and the testimony of the witnesses [who supported Leather's claims] Prinz and Ryan was unavailable, since they were still working for the Sheriff. *See* Pet., App. B at 24 a.

proper for us to reconsider them.
They must therefore be dismissed.

See Pet., App. A at 8a (3&4).

The Second Circuit, after addressing each of the Petitioner and County's other arguments, affirmed the lower court's determination. See Pet., App. A. at 13a.

The County of Putnam paid in full the outstanding judgment, including the punitive damages, together with interest and the additional attorneys fees and costs that were incurred since judgment was entered.[4]

[4] The County of Putnam is not a party to the Petition. *See* Pet., at ii.

REASONS FOR DENYING THE PETITION FOR A WRIT OF *CERTIORARI*

1. The Second Circuit did not decline to follow *Heck v. Humphrey* but rather correctly found that *Heck* did not apply to the facts of Leather's case

Heck does not apply to Leather's §1983 claim for three reasons. First, in connection with his claim for selective prosecution, Leather was not required to demonstrate or even infer that the underlying criminal prosecution was invalid. For selective prosecution does not require the litigant to prove that the prosecution was brought without probable cause or was terminated in his favor. *Lisa's Party City, Inc., v. Town of Henrietta,* 185 F.3d 12 (2nd Cir. 1999); *LaTrieste Restaurant and Cabaret v. Village of Port Chester,* 40 F.3d 587 (2nd Cir. 1994). The issue of an individual's guilt or innocence has no bearing on the validity of this claim. *Henry v. Daytop Village, Inc.*, 42 F.3d 89, 96 (2nd Cir. 1994).

Second, Leather never challenged the validity of the criminal conviction or introduced evidence that would imply the invalidity of that conviction. Leather's counsel in opening arguments advised the jury of the conviction and later adduced evidence at trial proving the conviction.

As found by the District Court in its post-trial opinion and pointed out by Petitioners herein, there was "no evidence" that Sheriff Thoubboron sought "to procure anything but a bona fide arrest." (Petitioner, n.3, citing App.45a). That finding, and Petitioners' concession of it, simply underscore the fact that Leather's claim did not imply or in any way invalidate the validity of his arrest or subsequent criminal conviction.

These circumstances distinguish Leather's case from the malicious prosecution claim brought in *Heck* since there the litigant was required to demonstrate both lack of probable cause to prosecute and termination of the criminal proceedings in his favor. In sum, two of the elements necessary to prove Heck's claim went directly to the lawfulness of the underlying conviction and thus necessarily would have implied the invalidity of that conviction. *Heck v. Humphrey*, 512 U.S. 477 (1994).

Third, *Heck* does not bar Leather's claim that he was terminated in violation of the equal protection clause of the Fourteenth Amendment when the County determined to selectively enforce its policies against Leather while at the same time intentionally not enforcing its policies with respect to the very same conduct as engaged in by other employees.

Under these circumstances, the Second Circuit's finding that *Heck* does not apply to bar Leather's claim was a correct application of the law to the facts. It was clearly not a finding that *Heck* was no longer good law. At no time did the Second Circuit indicate even inferentially that it believed *Heck* was no longer good law.

Further, *Heck* specifically addressed the issue of whether a state prisoner who had a remedy in habeus corpus could also proceed with a §1983 action for damages. As noted by Justice Ginsburg in her concurring opinion in *Spencer v. Kemna,* 118 S.Ct. 978 (1998), where federal habeas corpus is not available to address constitutional wrongs, §1983 necessarily must be. This view was first expressed by Justice Souter in his concurrence in *Heck*, which was joined by three other Justices. In that concurrence, Justice Souter explained that *Heck* should be read as creating a favorable termination requirement only for those individuals to whom federal habeas corpus is in fact available. *See, Spencer*, 118 S.Ct. at 989.

Without merit is Petitioners' claim that if *Heck* were still good law Leather's claim would have been barred. For even if *Heck* applies to bar non-prisoner §1983 claims, contrary to the opinion set forth by Justice Ginsburg in her concurrence, *Heck* still would not bar Leather's claim since his selective prosecution claim did not imply the invalidity of his criminal conviction.

2. There is no conflict in the Circuit Courts to whether *Heck* is still good law

Although Petitioners assert that the Circuit Courts are now divided on *Heck's* reach (Petition p. 8), in the same sentence they cite to the Circuit Courts' recent decisions which have correctly applied *Heck* and confirm that *Heck* remains good law. *Id., citing Figueroa v. Rivera*, 147 F.3d 77, 80 (1st Cir. 1998); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000), cert. denied, 121 S.C. 1601 (April 16, 2001); *Huey v. Stine*, 230 F.3d 226, 229 (6th Cir.2000); *Cabrera v. City of Huntington Park*, 159 F.23d 374, 380, n.6 (9th Cir. 1998).

In addition to the decisions of the First, Fifth, Sixth and Ninth Circuits cited by Petitioners, decisions from the remaining circuits do not demonstrate any conflict or division on the validity of *Heck*. *See Hector v. Watt*, 235 F.3d 154 (3rd Cir. 2001); *Mortimer v. Tritt*, 232 F.3d 888 (4th Cir. 2000), cert. denied, 121 S.Ct. 1211 (February 26, 2001); *Scott v. Sutker-Dermer*, 2001 WL 436193 (7th Cir. 2001); *Brooks v. Iowa Attorney General*, 242 F.3d 374 (8th Cir. 2000); *Mehdipour v. Chapel*, 2001 WL 468010 (10th Cir. 2001); *Abella v. Rubino*, 63 F.3d 1063 (11th Cir. 1995).[5]

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[5] *Mortimer, Scott, Brooks* and *Mehdipour* are unpublished opinions. However, they represent the most recent decisions

Moreover, should there be any doubt as to the Second Circuit's position with respect to the question framed by Petitioners, namely whether *Heck* is still good law, other cases decided by the Second Circuit demonstrate that the Second Circuit understands and adheres to the precise rule of law for which *Heck* stands. *See McCloud v. Jackson,* 2001 WL 99820 (2nd Cir. 2001);[6] *Amaker v. Winer*, 179 F.3d 48, 51 (2nd Cir. 1999).

3. Petitioners' do not meet this Court's standards for granting *certiorari* as set forth in Rule 10

Under these circumstances, the instant Petition does not meet the Court's well-established standards for granting *certiorari.*

The Court's limited scope of review is reflected in its own rules, which provide:

> Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons.

Rule 10 of the Rules of the Supreme Court of the United States (1999).

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by the Circuits that have articulated *Heck's* rule of law.

[6] Although *McCloud* is an unpublished opinion, it is one of the most recent decisions by the Second Circuit which have addressed *Heck.*

The instant proceeding does not fall within the categories set forth in Rule 10, which albeit not all inclusive, are indicative of situations where a petition will be granted. For here, as described *supra*, the Second Circuit's decision did not conflict with the decision of another United States Court of Appeals or a state court of last resort on the same important matter. Rule 10(a). This also is not a situation where the Second Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such departure by a lower court, as to call for an exercise of this Court's supervisory power. *Id.*[7]

Here, the Petitioners argue that the petition should be granted since there is disagreement amongst the Circuits as to whether *Heck* is still good law. As indicated *supra,* there truly is no split in the Circuits as all have continued to recognize *Heck.*

Moreover, the Second Circuit Court of Appeals has not decided an important question of federal law that has not been, but should be, settled by this Court, nor has it decided an important federal question in a way that conflicts with relevant decisions of this Court. Rule10(c).

Rather, this case falls squarely within the category of cases described by Rule 10 where the petition should not be granted:

> A petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings

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[7] Rule 10 subsection (b) would not apply since the decision at issue was not rendered by a state court of last resort.

> or the misapplication of a properly stated rule of law.

Rule 10 of the Rules of the Supreme Court of the United States (1999).

Heck's inapplicability to the facts of this case does not warrant this Court's judicial review of the matter.[8]

4. The Petition is untimely and thus not properly before this Court

The arguments put forth in support of the petition center around the Second Circuit's determination that *Heck* did not apply to bar Leather's §1983 claim. Fatal to this petition is the fact that the Second Circuit's substantive decision on *Heck's* inapplicability to this case was rendered on June 11, 1999. *See* Pet., App. C, 34a-46a.

In connection with the second appeal of Leather's case, the County of Putnam attempted to reiterate that *Heck* should bar the claim. However, the Second Circuit correctly viewed that argument as one for "reconsideration" and held that this argument was not only "rejected in [its] earlier decision in this

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[8] Granting this petition is not justified by reason of this Court's rules governing such leave. It is not warranted due to the current procedural posture of the matter. The County of Putnam has fully satisfied the judgment in this matter on behalf of itself and each of the Petitioners, including the punitive damages assessed against Thoubboron.

case" but also that "the County's reprise add[ed] nothing that would make it proper for [the Court] to reconsider them." *See* Pet., App. A at 8a.

This Court's rules require that a petition for a writ of *certiorari* be filed within ninety days after entry of the judgment or order sought to be reviewed. Rule 13(1) and (3) of the Rules of the Supreme Court of the United States (1999). Clearly, more than ninety days has passed from the Second Circuit's determination on the merits of *Heck*. *See* Pet., App. C at 34a (noting date of decision June 11, 1999).

Petitioners' attempt to seek review from this Court for a decision that was actually rendered in June of 1999 should be rejected as untimely.

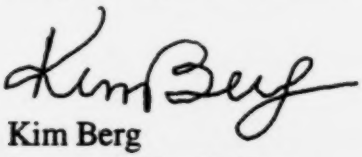
For these reasons, the Court lacks jurisdiction over the instant petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: White Plains, New York
May 22, 2001

Respectfully submitted,



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